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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted]31

BENJAMIN W. COREY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

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OCTOBER TERM, 1962

No. 7

BENJAMIN W. COREY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit dismissing petitioner's appeal September 18, 1962, rehearing denied October 3, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals dated September 18, 1962, is unreported at this time. A copy is appended. (App. pp. 1a-2a). No opinion was written in denying rehearing.

JURISDICTION

The judgment of the Court of Appeals, dismissing the appeal as too late, was made and entered September 18, 1962. A copy is appended. (App. p. 3a). A petition for rehearing was denied October 3, 1962. A copy of the Order of Court denying a rehearing is appended. (App. p. 3a). The jurisdiction of this Court is invoked under Title 28, U.S. Code, section 1254(1).

QUESTION PRESENTED

In computing the 10-day appeal period under Rule 37, Federal Rules of Criminal Procedure, is a final appealable judgment of conviction rendered in accord with Rule 32(b), Federal Rules of Criminal Procedure, when the defendant is "committed to the custody of the Attorney General or his authorized representative under the provisions of Title 18, United States Code, section 4208(b)", which requires study and recommendations "as a basis for determining the the sentence to be imposed".

STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of Title 18, U.S. Code, section 4208(b) and Rules 32, 35, 37, 39, and 46, Federal Rules of Criminal Procedure, are set forth in the Appendix at pages 3a-5a.

STATEMENT

Defendant was convicted by jury of submitting false claims to the Government in violation of Title 18, U.S. Code, section 287. The judgment of the District Court, April 9, 1962, was that he be "committed to the custody of the Attorney General or his authorized

representative under the provisions of Title 18, United States Code, Section 4208(b)". No appeal was taken.

That statute, by its express terms is used "If the court desires more detailed information as a basis for determining the sentence to be imposed". It requires a study and recommendation by the Bureau of Prisons within 90 days. The court received and considered this report, and, in accord therewith, on July 16, 1961,[1] suspended sentence, releasing the defendant on probation. (App. pp. 7a-8a)

Notice of appeal was given July 19, 1962, seeking substantive review of the trial proceedings. (App. pp. 6a-7a). The Government moved to dismiss the appeal on the ground that the original commitment by statute was deemed to be for the maximum sentence authorized by law—375 years imprisonment and fines of $750,000[2]; the Government contended, therefore, the defendant was not aggrieved by the reduction of sentence.

September 18, 1962, the Court of Appeals dismissed the appeal, holding that when the defendant was committed to the custody of the Attorney General for study on April 9, 1962, "the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time he should have acted." Accordingly, the right to appeal was held to be lost when the 10-day period for giving notice expired after April 9, 1962.

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[1] Proceedings in open court took place July 16, though formal entry is dated July 17. The difference is not material.

[2] This resulted from a finding that 75 false vouchers were submitted; the indictment covered 75 counts. Each is punishable by 5 years imprisonment, a $10,000 fine, or both. Title 18, U. S. Code, sec. 287.

REASONS FOR GRANTING THE WRIT

(a) Effect of the Statute on the Time for Appeal Should Be Defined

An important question of federal criminal law is presented by this case, raising a question which has not been, but will ultimately have to be, settled by this Court. The Federal Sentencing Act was passed August 25, 1958. Neither the language nor the legislative history touches on a change in appellate procedure; still, varying interpretations and uncertainties call for definition. The pertinent part, section 4208(b) of Title 18, U.S. Code, reads as follows:

> "If the court desires more detailed information *as a basis for determining the sentence to be imposed,* the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any *recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case,* shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section." (Italics supplied).

The crucial question is when does the 10-day period begin for giving notice of appeal under Rule 37(a)(2)?

with the commitment for study; or after the study has been completed and acted upon by the trial court? It seems clear enough that final disposition of the matter takes place only after the study has been made.

That was the view of the trial judge in the only case which has reached this Court, *Grabina* v. *United States*, 369 U.S. 426 (1962). In that case the Solicitor General conceded error in a memorandum filed in the case. This memorandum is quoted in 206 F. Supp. 38, 39-40. The Solicitor General said (p. 40):

> "The trial judge obviously believed that he was deferring sentence to await reports under 18 U.S.C. 4208(b), rather than imposing sentence which later would be subject to reduction."

The original commitment was made in the absence of the defendant; so, too, was the final sentence after the reports were received. The cause was reversed for resentencing with the defendant present.

In *United States* v. *DeBlasis*, 206 F. Supp. 38 (D. Md., 1962), where the quoted memorandum appears (pp. 39-40), the trial judge "obviously believed" that he was imposing the maximum sentence, which might, in his discretion, be affirmed or modified after receiving the report and recommendations from the Bureau of Prisons. It was held, therefore, that defendant had no right to be present at the reduction of the sentence following receipt of the Bureau of Prisons reports. The same result was reached on this point in *United States* v. *Johnson*, 207 F. Supp. 115 (E.D., N.Y., 1962), denying the right of the defendant to be present in court after the reports are made. The court affirmed the sentence as the maximum term authorized.

Only one case deals with the right of appeal: *United States* v. *Behrens*, 190 F. Supp. 799 (D. Ind., 1961).

The court had, in so many words, sentenced defendant to imprisonment for a definite term of 20 years. It also required the study prescribed in Title 18, U.S. Code, section 4208(c), and declared the sentence subject to modification in accord with section 4208(b). An attempt to appeal in forma pauperis was dismissed as too late, measuring the 10-day notice of appeal period from the original sentence. So far as appears there was no subsequent sentencing.

It seems that the *Behrens Case* is not in point for the court there obviously had concluded the matter by a sentence of 20 years. It said, "there is now no proceedings (sic) pending before the court". In the case at bar, no term was specified—simply a general commitment under section 4208(b).

Plainly, the trial court here had to do something further—affirm, reduce, or suspend sentence. Certainly it had a statutory obligation to receive and consider the report of the Bureau of Prisons. Under these circumstances the statutory implication of the maximum term is not to be considered the final sentence, but simply a mechanical technique to cover the custodial period of study and hold open for the court's future action the full range of penal authority.

Obviously, the nature of initial commitment may not be left to the state of the trial judge's mind—tentative in the *Grabina Case, supra,* and final in others. The legal right of appeal is too important to rest on such an uncertain base.

(b) The Decision Below Forfeits the Right of Appeal in Disregard of the Statutory Language

Congress authorized the use of this statute "If the court desires more detailed information as a basis for

determining the sentence to be imposed". **The law requires a study and expressly authorizes the Director of the Bureau of Prisons to make *any recommendations which he "believes would be helpful in determining the disposition of the case".***

After the study and recommendations are available, the court must exercise "its discretion", and affirm, reduce, or suspend the sentence. It must do something in a case such as this, where the commitment is for study, without a specified term of imprisonment, even, if it only affirms the maximum as it did in the *Johnson Case, supra.*

The jurisdiction of the Courts of Appeals is limited to "final decisions" of District Courts. By Rule 32, Federal Rules of Criminal Procedure, a judgment of conviction must include the sentence, and where any inquiry of law or fact is left open, that judgment is not final for purposes of appeal. *Beebe* v. *Russell,* 60 U.S. (19 How.) 283, 285 (1857). Obviously, tentative decisions of trial courts are not appealable. *United States* v. *Smith,* 331 U.S. 469 (1947). In a criminal case, final judgment means sentence (*Berman* v. *United States,* 302 U.S. 211, 212 (1937)), and an order which would suspend this indefinitely would be void. *Miller* v. *Aderhold,* 288 U.S. 206, 210-211 (1933). Chief Justice Hughes, in *Berman* v. *United States, supra,* said (p. 213) the judgment is not final until "it terminates the litigation on the merits, leaving nothing to be done but to enforce by execution what has been determined."

Here, the statute simply holds the matter open for 90 days, until the court has received the report and recommendations which it has requested. Then and only then, can the District Court finally discharge its

statutory obligation by (a) receiving and considering the report and recommendations which the Director of the Bureau of Prisons has made to be "helpful in determining the disposition of the case"; and (b) "determining the sentence to be imposed." The matter is then ready for appeal.

(c) The Legislative History Should Be Evaluated for the Guidance of Lower Federal Courts

The legislative history of Title 18, U.S. Code, section 4208(b) (the Federal Sentencing Act), is found in U.S. Code Congressional & Administrative News, 85th Cong., 2d Sess., 1958, pp. 3891 et seq. It shows beyond question that the purpose was to bring uniformity to sentencing procedures in the federal courts, and to this end the report and recommendations of the Federal Bureau of Prisons were to be available for the court's information and guidance.

That the Order on Probation of July 17 was the final sentence is shown beyond dispute by Senate Report No. 2013, July 29, 1958 (to accompany H. J. Res. 424):

> This section [now 4208(b)] would permit the court, in particularly complex cases, to commit the defendant to the Attorney General for a 3- to 6-month study. *After the court had received a summary of the Attorney General's findings, it could impose a final sentence under any applicable statute.*" (Italics supplied). [U.S. Code Cong. & Adm. News, *supra*, at p. 3891. Identical language is used in the Conference Report. Id. at p. 3905].

The Congress fully intended that only *after* the Court has received Attorney General's findings would *final sentence* be imposed. The same reasoning was followed by the Administrative Office of the United States Courts, Washington, D. C., in commenting on

the legislation [Id. at p. 3897]. By letter of July 21, 1958, it refers to the first commitment as a "tentative sentence", and says:

> The Judicial Conference feels that the sentencing judge *before imposing final sentence* should be able to receive, if he deems advisable, a more complete study of the defendant. (Italics supplied)

Since the jurisdiction of the appellate court extends only to final decisions (28 U.S. Code, sec. 1291), the order of July 17, made *after* the trial court had received the Attorney General's report, would seem to be the only one subject to appeal.

(d) The District Court Proceedings Plainly Show Final Sentencing Was Deferred

Unlike the *Behrens Case, supra,* where the sentence was expressly stated as 20 years, the trial court here simply committed defendant to the custody of the Attorney General under section 4208(b) of Title 18, U.S. Code. Defense counsel made no objection, for the record shows substantial psychiatric disability connected with defendant's military service in World War II and in Korea.[3] The court wisely recognized the need for professional study and recommendation "as a basis for determining the sentence to be imposed."

The report and recommendations of the Director of the Bureau of Prisons were received after the defendant had spent some 90 days at the Federal Penitentiary, Lewisburg, Pennsylvania. Whereupon the Court had the defendant brought before it, and said (App. pp. 7a-8a):

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[3] Petitioner, a member of the Massachusetts bar, was in a state of collapse and hospitalized immediately following the trial.

The Court: Now, Mr. Counsel, as you know as a result of our conferences in my lobby, this case comes back to me with the report concerning the defendant which I have studied and read, and *now it is my duty to dispose of the case at this point, finally.*

* * *

The Court: (Addressing defendant) We have discussed the matter fully for the last half-an-hour in my lobby. But I am compelled to ask you whether or not you wish to say anything in your own behalf *before I impose the sentence I am going to impose.*

* * *

The Court: Then, Mr. Clerk, . . . I am going to place you on probation, Mr. Corey, for two years, and I think *that is a proper dispostion of the case after hearing from the physicians and specialists in the Bureau of Prisons* * * *.

Pass the order, Mr. Clerk, probation for 2 years.

The Clerk: Benjamin W. Corey, hearken to your sentence as the Court orders it against you. * * *. (Italics supplied)

Here the Court carefully allowed the right of allocution, after expressly stating, "Now it is my duty to dispose of the case at this point, finally." This was a full and formal sentencing procedure and completely terminated the trial court's function. Up to that time, it was in suspense awaiting the reports required by statute. Then the Clerk pronounced, "Hearken to your sentence". Only then was the case ready for appeal.

(c) Orderly Administration of Criminal Justice Requires Settlement By This Court of These Procedural Questions

In order to make this statute serviceable, the District Courts must be able to call for the advisory help of the Bureau of Prisons. They cannot do so if the simple act of referring the matter is considered a final appealable judgment. If it be final, notice of appeal must be given within 10 days under Rule 37(a)(2). The entire case is then moved to the Court of Appeals (Rule 39, Federal Rules of Criminal Procedure) to run a course which may extend for a year or more. The District Court's jurisdiction is ended. *United States* v. *Smith,* 331 U.S. 469 (1947); *Berman* v. *United States,* 302 U.S. 211, 214 (1937); *Euziere* v. *United States,* 266 F. 2d 88, 91 (C.A. 10, 1959); *United States* v. *Tuffanelli,* 138 F. 2d 981, 985 (C.A. 7, 1943). Even if the Bureau of Prisons report recommends particular action, the trial court's hands are stayed until the appellate court's mandate is received, possibly years later, and then the only authority is to reduce the sentence under Rule 35, Federal Rules of Criminal Procedure.

The notice of appeal may postpone the study indefinitely, for the appellant is plainly entitled to bail pending appeal. Rule 46(a)(2), Federal Rules of Criminal Procedure. Thus a defendant who desires the benefit of the careful study and evaluation intended by Congress, is forced to appeal and remove the matter from the District Court's jurisdiction, at least pending review.

In the *Smith Case, supra,* this Court directed extraordinary writs of mandamus and prohibition, to prevent a District Judge from exercising jurisdiction after the cause was appealed.

If the referral to the Bureau of Prisons for study be considered a final sentence for the maximum term, then many cases will be appealed, which might otherwise result finally in suspended or reduced sentences, with no appeal. Why congest the appellate courts with tentative decisions which the trial court may, and probably will, reduce on recommendation of the Bureau of Prisons? However, if such be the proper scope of this statute, then this Court should announce it, so that the right of appeal be not lost in many cases by ambiguity in the statute.

Numerous federal prisoners are in custody under section 4208(b) of Title 18, U.S. Code. This enlightened approach to sentencing was adopted by Congress after careful study, with the assistance of this Court's Administrative Officers. It appears that the First Circuit has totally disregarded the legislative history of the law, and given no thought to the effect on the administration of justice. To hold that defendant should have appealed when the case was referred to the Bureau of Prisons for study is to require frustration of the statutory purpose.

On the other hand, a defendant so appealing may well face dismissal on a challenge to the appellate jurisdiction on the ground there is more to be done by the District Court, and the decision below lacks finality. *United States* v. *Tuffanelli*, 138 F. 2d 981, 984-5 (C.A. 7, 1943)

CONCLUSION

Because different federal judges have employed commitment under Section 4208(b) of Title 18, U.S. Code, as a deferment of sentence, and as a final sentence, the time for giving notice of appeal is uncertain.

Proper administration of criminal justice warrants a definitive statement by this Court.

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CERTIFICATE OF SERVICE

I, Maurice C. Goodpasture, a member of the Bar of the Supreme Court of the United States, one of the attorneys for petitioner, hereby certify that on the 2d day of November, 1962, I served a copy of the foregoing Petition for a Writ of Certiorari on the respondent as follows: (1) On the Solicitor General, Department of Justice, Washington, D. C., by mail, postage prepaid, to the above address, and (2) On the United States Attorney for the District of Massachusetts by mail in a duly addressed envelope, with air mail post-

age prepaid, to Thomas P. O'Connor, Assistant United States Attorney, Post Office Building, Devonshire and Water Streets, Boston, Massachusetts.

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